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No. 94-1244

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37.5, amicus curiae City and County of San Francisco, joined by the 60 California cities and towns identified below ("the cities"), submits this brief in support of petitioner John W. Behrens.[1] The City and County of San Francisco is a municipal corporation operating under a Charter adopted pursuant to the California Constitution, article XI, section three.

This case involves the right of a public official who is entitled to qualified immunity in a civil rights action not to be subject to burdensome discovery, other pre-trial proceedings and trial. The cities have a direct interest in the resolution of the question before the Court. Each city is subject to lawsuits arising under 42 U.S.C. §1983, alleging that the cities, their officers or employees violated an individual's constitutional rights. When city officers and employees are targeted as individual defendants in such lawsuits, the cities often assert the defense of qualified immunity.

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[1] The following California public entities join in this brief: the cities of Alameda, Anaheim, Bakersfield, Carlsbad, Cathedral City, Cerritos, Culver City, Del Rey Oaks, Dinuba, Eureka, Exeter, Farmerville, Galt, Greenfield, Huron, Huntington Beach, Indio, King City, Lafayette, Lemon Grove, Lindsay, Los Angeles, Lynwood, Malibu, Manteca, Marina, Monterey, Monterey Park, Needles, Oakland, Orange Cove, Orinda, Palm Desert, Piedmont, Pleasanton, Porterville, Redding, Redlands, Riverside, San Bruno, San Diego, San Jacinto, San Pablo, Santa Ana, Santa Rosa, Santee, South El Monte, Sunnyvale, Susanville, Thousand Oaks, Tracy, Tulare, Vacaville, Vernon, Visalia, Walnut Creek, West Sacramento, West Hollywood, Woodlake, and the Town of Los Gatos.

Each of the cities is within the jurisdiction of the Ninth Circuit Court of Appeals, and is therefore subject to that Court's decision in this case. Under that decision, public officials claiming qualified immunity are prevented from filing an interlocutory appeal of more than one order of the district court denying that claim.

SUMMARY OF ARGUMENT

The Ninth Circuit's limitation on appeals involving claims of qualified immunity directly conflicts with the purpose behind the doctrine. This Court's decisions "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage of litigation," (*Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citations omitted)), so that qualified immunity will shield public officials from being subjected to burdensome pre-trial proceedings including discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 817 (1982). The inevitable effect of the Ninth Circuit's one-appeal limitation, however, is that public officials will have to submit to burdensome pre-trial discovery because they will be forced to wait until the late stages of litigation to appeal a decision denying qualified immunity.

ARGUMENT

LIMITING PUBLIC OFFICIALS TO ONE PRE-TRIAL APPEAL OF DECISIONS DENYING QUALIFIED IMMUNITY IS INCONSISTENT WITH THE CENTRAL PURPOSE OF THE DOCTRINE OF QUALIFIED IMMUNITY.

In *Butz v. Economou*, 438 U.S. 478 (1978), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court refined the doctrine of qualified immunity and its applicability to public officials. Much of the debate in *Butz* and *Harlow* addressed the question of whether high-ranking public officials should be absolutely immune from suit, or whether they should have the more limited protection of qualified immunity. This Court recognized that denying absolute immunity to a public official has significant social costs:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." [Citations omitted.]

Harlow, 457 U.S. at 814.[2]

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[2] For a thorough discussion of the social costs inherent in limiting governmental officials' immunity defenses, *see* Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public*

Despite these costs, a majority of the members of the Court held in *Harlow* and *Butz* that qualified, not absolute, immunity was appropriate. The Court was careful to explain that qualified immunity provided public officials with sufficient protection because "insubstantial suits need not proceed to trial" given the availability of motions to dismiss and motions for summary judgment. *Harlow*, 457 U.S. at 807-808, 814; *Butz*, 438 U.S. at 507-508.

Thus, the Court intended that qualified immunity would serve to protect public officials from the burdens of trial and pre-trial proceedings, including "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Harlow*, 457 U.S. at 817. The Court found these burdens to be "peculiarly disruptive of effective government."[3]

Officials for Damages, 1980 S.Ct.Rev. 281, 324-327, cited with approval in *Harlow*, 457 U.S. at 814, n.22; *see also*, Coffey, *Waiving Local Government Immunity in North Carolina*,' 27 Wake Forest L. Rev. 709, 714 (Fall, 1992) (noting that a "second major catalyst to insurers dropping municipal liability coverage [in the 1980's] was the utter explosion of civil rights claims against local governments.").

[3] In *Harlow*, the Court cited with approval Judge Gesell's eloquent discussion of the burdens public officials face when made the frequent target of lawsuits:

> We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court recognized that the protections afforded public officials under *Harlow* would be lost unless public officials were able to file interlocutory appeals of trial court decisions denying qualified immunity. The Court held that qualified immunity shared an "essential attribute" with absolute immunity: each is "an entitlement not to stand trial under certain circumstances." 472 U.S. at 525. "The very purpose of such immunities is to protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not immediately appealable." *Id.* at 537 (O'Connor, J. and Burger, C.J., concurring).

Thus, the modern doctrine of qualified immunity arose out of a debate over whether certain public officials should even be subject to suit. In determining that qualified immunity struck the appropriate balance between protecting individual rights and the adverse consequences inherent in denying officials absolute immunity, the Court endorsed pre-trial procedures – including interlocutory appeals – designed to resolve the issue of qualified immunity before public officials would be subject to trial or burdensome pre-trial proceedings. *See Mitchell*, 472 U.S. at 524-530. The Ninth Circuit's one-appeal rule

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> government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. . . . The effect of this development upon the willingness of individuals to serve their country is obvious.

Harlow, 457 U.S. at 817, n.29, *quoting, Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C.Cir. 1979) (Gesell, J., concurring).

significantly alters this balance. For these reasons, the Court should reverse the decision below.

A. To Minimize the Adverse Consequences of Lawsuits Against Public Officials, Questions of Qualified Immunity Must Be Resolved Before Public Officials Are Subjected to Trial or Burdensome Pre-Trial Proceedings.

In *Butz* and *Harlow*, this Court stated its expectation that courts would quickly resolve issues of qualified immunity through motions to dismiss and motions for summary judgment. *Butz*, 438 U.S. at 507-508; *Harlow*, 457 U.S. at 808. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court instructed that "qualified immunity questions should be resolved at the earliest possible stage of a litigation," and advocated the following procedure:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is *entitled to dismissal prior to discovery.* [Citation omitted.] If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's *motion for summary judgment* on qualified immunity grounds can be resolved.

Anderson, 483 U.S. at 646, n.6 (emphasis added).

This Court has repeatedly explained that early resolution of qualified immunity is necessary to minimize the

social costs associated with subjecting public officials to lawsuits arising out of the performance of their duties:

> Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government."

Mitchell, 472 U.S. at 526, *quoting*, *Harlow*, 457 U.S. at 817; *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."); *Anderson*, 483 U.S. at 638 ("[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (describing the balance the doctrine of qualified immunity strikes between "the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.")

Thus, when a public official is faced with a complaint that does not state a claim for violation of a clearly established constitutional right, that official can file a motion to dismiss. *See Mitchell*, 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."). In addition, if a plaintiff has stated a claim sufficient to withstand a motion to dismiss, a public

official is still protected from some of the burdens associated with pre-trial procedures and trial because the official can file a motion for summary judgment. *Id.* ("Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.").

At either of these stages, *Mitchell* permits the public official to file an interlocutory appeal. *Id.* at 527 ("[A] defendant's motion for dismissal or summary judgment . . . easily meets [the] requirements [for an appealable interlocutory decision]."); *see Siegert v. Gilley*, 500 U.S. 226 (1991) (appeal following denial of motion to dismiss) and *Hunter*, 502 U.S. 224 (appeal following denial of motion for summary judgment).

Nothing in this Court's decisions on qualified immunity supports the proposition that a public official waives his right to appeal the denial of a summary judgment motion if earlier he exercised his right to appeal the denial of a motion to dismiss. In fact, the practical consequence of the one-appeal rule is that public officials will lose much of the protection that qualified immunity is meant to afford.

B. Under the Ninth Circuit's Rule, Public Officials Lose an Essential Protection Afforded By Qualified Immunity Because They Will Be Forced to Endure Discovery and Other Pre-Trial Proceedings Rather Than Risk "Wasting" Their One Appeal On a Rejected Motion to Dismiss.

In *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992), the Ninth Circuit established its one-appeal rule. The court expressed its annoyance with having to address a large number of appeals on qualified immunity that, the court perceived, were filed as delaying tactics. 968 F.2d at 870. Rather than establishing a procedure for eliminating non-meritorious appeals, the court summarily imposed its one-appeal rule. The incongruity between this new rule and the problem it is meant to address is highlighted by the following passage from the court's decision:

> For the same reasons that an official defendant may not use the immediate appeal that the law allows him to convince the court to resolve disputed factual issues in his favor [citation omitted], he also may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain.

Id. at 870-871.

This reasoning is fundamentally flawed. In *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151 (1995), this Court explained that interlocutory appeals under *Mitchell* are meant to resolve "purely legal matters," not factual disputes. The reasons for this limitation on interlocutory

appeals are obvious: "Institutionally speaking, appellate judges enjoy no comparative expertise" relative to trial courts in resolving factual disputes. 115 S.Ct. at 2157. Consequently, interlocutory appeals of fact-based questions "are less likely to bring important error-correcting benefits . . . than where purely legal matters are at issue." *Id.* at 2158.

In no way do "the same reasons" support the one-appeal rule. "Purely legal matters" can be presented through appeals of orders denying both motions to dismiss and motions for summary judgment. A motion to dismiss can show that, as a matter of law, the facts stated in a complaint do not allege the violation of a clearly established right. A summary judgment motion based on undisputed facts following discovery can show that a public official's conduct did not, as a matter of law, violate any clearly established right. Thus, "institutionally speaking," the one-appeal rule has no merit.

Moreover, the one-appeal rule poses an obvious dilemma for those whom qualified immunity is meant to protect. If a public official is limited to one appeal of a denial of qualified immunity, the official naturally will wait until the late stages of litigation to appeal. In most cases it would not be worth the risk to appeal at the pleading stage and forfeit the right to appeal a later adverse summary judgment ruling. But to postpone an appeal is to forfeit much of the protection of qualified immunity.

This Court's decision in *Siegert v. Gilley*, 500 U.S. 226 (1991), is illustrative. In *Siegert*, a public official, Gilley,

filed a motion to dismiss which claimed he was entitled to qualified immunity. Gilley argued that the facts the plaintiff alleged did not state a claim for deprivation of a liberty interest without due process of law. When the district court denied Gilley's motion to dismiss. Gilley filed an interlocutory appeal and prevailed.

Gilley followed the course consistent with the purpose behind qualified immunity; he filed his appeal at the earliest possible stage of litigation. *Anderson,* 483 U.S. at 646, n.6. Of course, Gilley could have proceeded with discovery following denial of this motion to dismiss and then raised qualified immunity again in a motion for summary judgment. If the district court denied that motion, Gilley could have filed an interlocutory appeal. But had Gilley delayed his appeal, he would have lost the protection against "such pretrial matters as discovery" that are "peculiarly disruptive of effective government." *Mitchell,* 472 U.S. at 526.

Had Gilley's case arisen in the Ninth Circuit, he would have taken a significant gamble by filing his appeal following the denial of his motion to dismiss. Although this Court vindicated Gilley's position, it was by no means clear that an appellate court would hold that Siegert's complaint failed to state a claim for deprivation of a liberty interest. The district court and three Justices of this Court believed that the complaint *did* state a claim. *See Gilley,* 500 U.S. at 235 (Kennedy, J., concurring) ("As revealed by the differences in our majority and dissenting opinions, the question . . . [is] of some difficulty.").

Thus, in the Ninth Circuit, the prudent course for Gilley to have followed would have been to suffer the

"burdens of litigation" and then file a motion for summary judgment. As this Court's decisions show, these burdens can be significant. *See, e.g., Mitchell,* 472 U.S. at 515 ("Discovery and related preliminary proceedings dragged on for the next five-and-a-half years" and included deposition of Attorney General); and *Harlow,* 457 U.S. at 805 (involving "eight years of discovery").

The one-appeal rule is intended to serve two purposes; neither is sufficient to overcome the countervailing benefits of early resolution of qualified immunity claims. First, the rule is meant to limit the caseloads carried by appellate courts. In *Mitchell,* however, this Court found that the goal of reducing dockets does not justify restricting a public official's right to resolve qualified immunity through an interlocutory appeal. 472 U.S. at 518 (reversing decision that was based on fear "that allowing piecemeal appeals of such issues would unduly burden appellate courts").

Second, the one-appeal rule is intended to avoid pretrial delay. *See Pelletier,* 968 F.2d at 870 (criticizing the use of interlocutory appeals as "delaying tactics"). Of course, interlocutory appeals do not result in delay if they are successful. Moreover, if a public official files an unsuccessful appeal following denial of a motion to dismiss, and if the official may not file an appeal following a denial of a motion for summary judgment, that official will have to stand trial. The trial court's resources are conserved if an error can be corrected through an interlocutory appeal.

This Court has recently recognized this point:

> Of course, sometimes interlocutory appellate review has important countervailing benefits. In certain cases, it may avoid injustice by quickly correcting a trial court's error. It can simplify, or more appropriately direct, the future course of litigation. And, it can thereby reduce the burdens of future proceedings, perhaps freeing a party from those burdens entirely.

Johnson v. Jones, 115 S.Ct. at 2154. In addition, this Court in *Mitchell* rejected the dissenters' argument that the benefits of interlocutory appeals are outweighed by the dangers of giving "government officials a potent weapon to use against plaintiffs, delaying litigation endlessly. . . . " *Mitchell*, 472 U.S. at 556 (Brennan, J., dissenting).

Finally, to the extent defendants abuse the right to file interlocutory appeals, the logical way for the courts to respond is to target that abuse. This Court attempted to do just that in *Johnson*. In fact, the effect of the *Johnson* decision will undoubtedly be to ease the burden on appellate courts by eliminating many qualified immunity appeals that focus on the resolution of factual disputes. Unlike this Court's approach in *Johnson*, the one-appeal rule precludes appeals without regard to their merit.

CONCLUSION

For all the foregoing reasons, this Court should reverse the decision below.

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